80-834

Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980
No. _____

HIGHLANDERS INC. and EMANUEL M. COMORA,

Petitioners,

v.

DON ROTHMAN, TRUSTEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONALD R. COLVIN
9465 Wilshire Blvd.
Suite 603
Beverly Hills, California 90212
(213) 278-7616

Member of the Bar
of the United States Supreme Court

J. GALLAGHER, Printed Briefs (714) 835-6522

THE QUESTIONS PRESENTED

1. DOES THE LAW AS ESTABLISHED BY THE SUPREME COURT OF THE UNITED STATES UNDER THE DOCTRINE OF HAZEL-ATLAS CO. V. HARTFORD-EMPIRE CO., 322 U.S. 238 (1944) AND THE DECISIONAL PRINCIPLES PURSUANT TO RULE 60(b)(6), FEDERAL RULES OF CIVIL PROCEDURE, REQUIRE A CIRCUIT COURT OF APPEALS TO VACATE AND SET ASIDE AN INVOLUNTARY BANKRUPTCY PROCEEDING WHERE THE INITIAL JURISDICTION OF THE BANKRUPTCY COURT WAS CREATED BY A RECENTLY DISCOVERED, SURREPTITIOUS FRAUD PERPETRATED UPON THE BANKRUPTCY COURT BY ATTORNEYS, AS OFFICERS OF THE COURT, WHO PREPARED AND FILED THE COUNTERFEIT INVOLUNTARY PETITION IN BANKRUPTCY AND WHO HAVE NEVER DENIED THE CHARGES OF FRAUD AND CONTINUE TO REPRESENT THE SHAM "PETITIONING CREDITORS" AND "CREDITORS COMMITTEE?"

a. CAN SUCH A FRAUDULENTLY ACQUIRED JURISDICTION BE LEGITIMATIZED BY A PURPORTED FILING OF A CHAPTER XI ARRANGEMENT PROCEEDINGS FILED AT LEAST NINE YEARS BEFORE THE FRAUD UPON THE COURT

WAS, OR REASONABLY COULD HAVE BEEN, DISCOVERED?

b. CAN A CHAPTER XI ARRANGEMENT PLAN NEVER HEARD, WAS ABANDONED, AND SPECIFICALLY DISMISSED BY THE REFEREE CONSTITUTE A WAIVER OR ESTOPPEL PRECLUDING THE INVOLUNTARY BANKRUPTCY PURPORTED DEBTOR FROM CHALLENGING THE ENTIRE BANKRUPTCY PROCEEDING?

2. SHOULD REVIEW OF THIS CASE ON CERTIORARI BE GRANTED SO THAT THE BASIC CONFLICT MAY BE RESOLVED BETWEEN THE INSTANT JUDGMENT OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT, THAT OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT (PUBLICKER V. SHALLCROSS, 166 F. 2d 949 (3d Cir., 1939); CF. SCHUM V. BAILEY, 578 F.2D 493, 504-506 (3D CIR., 1978)), AND THAT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT (WYMAN V. NEWHOUSE, 93 F.2D 313, 315 (2D CIR., 1937)?

3. SHOULD REVIEW OF THIS CASE ON CERTIORARI BE GRANTED IN ORDER THAT THIS COURT MAY DECIDE WHETHER FRAUD COMMITTED UPON THE BANKRUPTCY COURT BY OFFICERS OF THE COURT AND ENTAILING THE PUBLIC INTEREST MAY BE EXCUSED BY RESORT TO THE DOCTRINES OF RES JUDICATA OR COLLATERAL ESTOPPEL?

4. CAN SANCTIONS AGAINST PETITIONERS IN DOUBLE THE AMOUNT OF COSTS AND ALLOWANCE OF DEFENDANTS' ATTORNEY'S FEES BE ALLOWED TO STAND WHERE THERE HAS NEVER BEEN ANY FINDING OF BAD FAITH CONDUCT IN THOSE PROCEEDINGS AS REQUIRED BY THE HOLDING OF THIS COURT IN ROADWAY EXPRESS, INC. V. PIPER, _____ U.S. _____ , 100 SP. CT. 2455, 65 L.ed.2D 488 (NO. 79-701, JUNE 23, 1980)?

CERTIFICATION AS TO INTERESTED PARTIES

The undersigned, counsel of record for Appellants, certifies that the following listed parties have an interest in the outcome of this case. These representations are made to enable judges of the court evaluate possible disqualifications or recusal.

Don Rothman, Trustee
GENDEL, Raskoff, Shapiro
& Quittner
Suite 600
1801 Century Park East
Los Angeles, CA 90067

Danning & Gill,
Attorney for the
Petitioning Creditors
15233 Ventura Blvd.
Sherman Oaks, CA 91403

Don Rothman, Trustee
615 South Flower St.
Los Angeles, CA 90017

Minor, Popeney & Lebetsamer
Attorney for
Sanitek Products, Inc.
3878 West Carson Street
Torrance, CA 90503

Dolores Lawrence
1523 Riverview
Orange, CA
(Alleged Petitioning Creditor)

Sanitek Prroducts, Inc.
3959 Goodwin Avenue
Los Angeles, CA
(Petitioning Creditor)

Grace M. Fitzner
Space 404
Terrace 4
12089 Lopez Canyon
San Fernando, CA 91342
(Alleged Petitioning Creditor)

Donald R. Colvin,
Attorney for Appellants

INDEX

Page

The Questions Presented i
Certification As To Parties iv
Index v
Table of Authorities viii
Grounds On Which The Jurisdiction Of This Court Is Invoked 1
Jurisdiction 4
Constitutional Provisions, Statutes, and Rules Involved 5
Bankruptcy Act Of 1938; Chapter XI 6
Statement Of The Case 9
Reasons For Granting The Writ 15
1. The United States Court of Appeals For The Ninth Circuit Mistakenly Decided An Important Question 15
a. The Appellate Court's Judgment Is In Conflict With Applicable Decisions Of This Court 15
b. The Appellate Court's Judgment Here Is In Conflict With The Decision Of The United States Court Of Appeals For The Third Circuit 19
c. Where, As Here, The Fraud Upon The Court Is Accomplished By An Officer Of The Court It Cannot Be Tolerated 21

INDEX (cont.)

d. The Fraud Upon The Court Also Comes Within The Provision Of Rule 60(b)(6) Federal Rules Of Civil Procedure 22

e. The 1975 Opinion Of The Court Of Appeals For The Ninth Circuit Is Neither A Ground For Denying Petitioners' Motion Because Of Res Judicata Or Collateral Estoppel 24

f. The Supposed Plans Of A Chapter XI Arrangement 26

2. Certiorari Should Be Granted So That The Wrongfully And Unfounded Sanctions May Be Voided 28

Conclusion 29

APPENDICES

Appendix (i)

Findings Of Facts and Conclusions of Law on Motion To Vacate and Set Aside Involuntary Petition in Bankruptcy, Bankruptcy Proceedings and Adjudication Of Highlanders, Inc. As A Bankrupt, and For An Accounting 31

Appendix (ii)

Order Upon Motion To Vacate and Set Aside Involuntary Petition in Bankruptcy, Bankruptcy Proceedings and Adjudication of Highlanders, Inc. As A Bankrupt, and For An Accounting 41

INDEX (cont.)

Appendix (iii)
Civil Minutes — General 43
Appendix (iv)
Memorandum 44
Appendix (v)
Order 47
Appendix (vi)
Order 49
Appendix (vii)
Order Extending Time To File Petition
For Writ Of Certiorari 51
PROOF OF SERVICE 52

TABLE OF AUTHORITIES

Cases **Page**

Bizzell v. Hemingway
548 F.2d 505, 507 (4th Cir., 1977) 24

Hazel-Atlas v. Hartford-Empire Co.
322 U.S. 238 (1944)..... i, 15, 16, 17, 18, 19, 21, 23, 26

In re Barasch
439 F.2d 1393 (9th Cir., 1971)..... 28

In re Hudlik-Ross Co.
(S.D.N.Y. 1961) 198 F.Supp. 695, aff'd,
297 F.2d 32; Rule 21, Fed. R. Civ. P.) 12, 26, 36

Kupferman v. Consolidated Research & Mfg. Corp.
459 F.2d 1072, 1078 (2d Cir., 1972)..... 22

Marshall v. Holmes
141 U.S. 589 (1891)..... 18, 20

Martina Theater Corp. v. Schine Chain Theaters, Inc.
278 F.2d 798, 801 (2d Cir., 1960)..... 22

Patapoff v. Vollstedt's, Inc.
267 F.2d 863 (9th Cir., 1959)..... 27

Precision Co. v. Automotive Co.
324 U.S. 806, 815 (1945)..... 18

Publicker v. Shallcross
166 F.2d 949 (3d Cir., 1939)..... ii, 19, 20

Roadway Express, Inc. v. Piper
_____ U.S. _____, 100 Sp. Ct. 2455,
2455, 65 L.ed. 2d 488
(No 79-701, June 23, 1980)?..... iii, 28

Root Refining Co. v. Universal Oil Products Co.
169 F.2d 514 (1948)..... 22

S&E Contractors v. United States
406 U.S. 1 (1972) 17

TABLE OF AUTHORITIES (cont.)

Schum v. Bailey
578 F.2d 493, 504-506 (3d Cir., 1978)..... ii, 20
United States v. Johnson
319 U.S. 302 (1943) 18
United States v. Throckmorton
98 U.S. 61 (1878) 20, 21
Wyman v. Newhouse
93 F.2d 313, 315 (2d Cir., 1938)?..... ii, 22

TABLE OF AUTHORITIES (cont.)

Codes	Page
11 USC §721	6, 10, 11, 27
11 USC §742	6
11 USC §776	6
28 USC §1254	4, 7
28 USC § 1655	8
28 USC §1927	7
U.S. Constitution	
Amendment V	5
Article I §8 Clause 4	5, 14

Rules	Page
Bankruptcy Rules 221(a)	36
Bankruptcy Rules 924	23
1938 Bankruptcy Act, §4(b)	5, 9, 11, 14
Emergency Price Control Act 1942	18

Supreme Court Rules	Page
Rule 17	29

Federal Rules of Civil Procedure	Page
Rule 60(b)(6)	i, 22, 23, 24, 27

Texts	Page
1 Collier on Bankruptcy	26
9 Collier on Bankruptcy	27
Moore's Federal Practice	4, 21

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GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Petitioners pray that a writ of cerrtiorari issue to review the Judgments of the United States Court of Appeals for the Ninth Circuit entered in Number 78-2812 which

affirm the decision of the United States District Court, filed June 19, 1978, "... denying (Petitioners') Motion to Vacate and Set Aside Involuntary Petition in Bankruptcy. . . ." because of fraud upon the Bankruptcy Court perpetrated from June 23, 1966, the date the involuntary petition was prepared and filed by the officers of the court who have undeniably, knowingly, and willfully continued to conduct fraud upon the court to the present.

Bankruptcy Judge Moriarty's Order of February 6, 1978, in turn was predicated upon "Findings of Fact and Conclusions of Law On Motion To Vacate and Set Aside Involuntary Petition In Bankruptcy, Bankruptcy Proceedings, And Adjudication of Highlanders, Inc. As A Bankrupt, And For An Accounting" which was signed and filed February 3, 1978, and Entered February 6, 1978, although stamped as "Received" by the United States District Court Clerk on January 27, 1978. They have not been published.

The Findings of Fact and Conclusions of Law relevant to the Questions Presented For Review by this Court are printed in Appendix (i).

The Judgments of the Court of appeals, deciding to affirm the district court's Judgment in Number 78-2812 (Appendix iii) and assessing, without any findings of bad faith conduct, sanctions against Petitioners, were filed March 24, 1980. The Judgments, in form of a **MEMORANDUM**, were designated "not for publication." They are before this Court for review upon certiorari and

printed as Appendix (iv). Petitioners also pray that a writ of certiorari issue at the same time to review the propriety of the above-described assessment of sanctions by the United States Court of Appeals for The Ninth Circuit. (See Appendices (iii) (vi).)

Petitioners timely filed with the Court of Appeals a petition for rehearing and a suggestion for rehearing en banc. On July 17, 1980, the Court of Appeals filed an Order deciding: "The petition for rehearing is denied and the suggestion for rehearing en banc is rejected." That Order is printed as Appendix (v).

On July 21, 1980, the Court of Appeals, still refraining from making any findings of conduct which "constituted or was tantamount to bad faith," awarded, by Order, "appellee's double costs on appeal in the amount of five thousand and eighty-seven dollars and ninety-two cents ($5,087.92) and reasonable attorney's fees in the amount of sixteen thousand seventy-eight dollars and seventy-five cents ($16,078.75). This Order assessing sanctions is printed as Appendix (vi).

Upon consideration of the timely application of counsel for the Petitioners, Mr. Justice William H. Rehnquist Ordered, on Octoberr 16, 1980. ". . . that the time for filling a petition for writ of certiorari in . . ." this case be ". . .extended to and including November 17, 1980." A copy of that Order of Extension is printed as Appendix (vii).

The above sets forth the grounds, emphasizing also the

importance and impact of the Questions Presented For Review within the purview of Rule 17, 1980 Rules of the Supreme Court of the United States as will be more particularly expounded under the section: **REASONS FOR GRANTING THE WRIT, infra.**

JURISDICTION

The jurisdiction of this Court to review this case and the questions prersented herein is established by 28 U.S.C., Section 1254 (1). See 12 Moore's Federal Practice, Par. 434.01 at 6-46 to 6-51 (2d Ed., 1980).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

ARTICLE I, SECTION 8, CLAUSE 4

"The Congress shall have power

* * * To establish . . . uniform laws on the subject Bankruptcies throughout the United States."

AMENDMENT V

"No person shall . . . be deprived of . . . property, without due process of law . . ."

STATUTES INVOLVED

1938 BANKRUPTCY ACT, SECTION 4(b)

". . .any moneyed, business or commercial corporation . . . owing debts to the amount of $1,000 or over, may be adjudicated an involuntary bankrupt upon default or an impartial trial and shall be subject to the provisions and entitled to the benefits of this title."

"§721. Filing petition; pending bankruptcy prroceeding.

A debtor may file a petition under this chapter in a pending bankruptcy proceeding either before or after his adjudication. (July 1, 1898, ch. 541, §321.")

"§742. Continuance of debtor in possession.

Where no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have all the title and exercise all the power of a trustee appointed under this title, subject, howeverr, at all times to the control of the court and to such limitations, restrictions, terms, and conditions as the court may fom time to time prescribe. July 1, 1898, ch. 541, § 342.

"§776. Abandonment or rejection of arrangement before confirmation.

If the schedule of the executory contracts and the schedules and statements of affairs, as provided by paragraph (1) of section 724 of this title, are not duly filed, or if an arrangement is not proposed in the manner and within the time fixed by the court, or if an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall—

(1) where the petition was filed under section 721 of this title, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this title. (July 1, 1898, ch. 541, §376.)

TITLE 28, U.S.C., SECTION 1927

"Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."

RULES INVOLVED

RULE 60(b), FEDERAL RULES OF CIVIL PROCEDURE

Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party of his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3)

not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram nobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

On June 23, 1966, the partnership law firm, Danning and Gill, specifically acting by and through a senior partner, David A. Gill, filed an involuntary petition in bankruptcy under Section 4(b) of the 1938 Bankruptcy Act (Appendix (i); Finding 1). Although Mr. Gill was a member of the Federal Bar in California and from 1965-1968 had been "Associate Editor, **Bankruptcy Study Group Bulletin**," he knowingly prepared and filed the Involuntary Petition In Bankruptcy under Section 4(b) of the 1938 Bankruptcy Act against George C. Highley ("Highley," herein), an individual, and Highlanders, Inc. ("Highlanders" herein), a California corporation.

Highley, in June 1966, and thereafter, was only an employee of Highlanders, having neither partnership, proprietarial, nor alter ego relationship.

Because Robert Snyder, one of the required three "petitioning creditors" admitted by affidavit on June 29, 1966, he was not, and had not been on June 23, 1966, a creditor, an amended involuntary petition had to be filed. In order to validate the appointment and actions of the Receiver and the then referee, Howard V. Calverley, the bankruptcy court allowed the amended involuntary petition to be retroactive to June 23, 1966.

The amended involuntary petition in bankruptcy ("petition" herein) was also prepared and filed with the bankruptcy court by attorney David Gill on September 2, 1966. It was apparently signed by Dolores Lawrence ("Lawrence" herein), Grace M. Fitzner ("Fitzner" herein) and L. C. Moseley as

president of, and for, Sanitek Products, Inc. ("Sanitek" herein), replacing Robert Snyder as the required third petitioning creditor.

The bankruptcy court and all parties accepted the alleged signatures of Lawrence and Fitzner as genuine and the Amended Petition as valid because it was prepared and filed by an officer of the court. Ten years later, the signatures proved to be counterfeit and the amended petition a fraud upon the court. (Appendix (i); Findings 27 and 41)

It is alleged, and Bankruptcy Judge Moriarty found in his February 6, 1978, Findings of Fact, that Highlanders "voluntarily filed a petition for an arrangement under Chapter XI of the Bankruptcy Act... (11 U.S.C., Section 721)" in 1966, and "... proposed three different Plans of Arrangement to its creditors" during 1967. (Appendix (i); Findings 2 and 3)

Since the initial, ineffective, involuntary petition in bankruptcy of June 23, 1966, control of Highlanders' business, which had been seized by the receiver, was obtained through the device of a bankruptcy court temporary restraining order and order to show cause. (Bankruptcy Court Docket at 1-2) Neither was ever heard and finally, after an unexplained "out of court settlement," each was "taken off calendar" on May 22, 1967. (**op. cit.** at 12)

On January 31, 1968, Referee Calverly conditionally approved an application by the receiver "to transfer substantially all of the assets of Highlanders, Inc.... subject to certain liens." (Appendix (i); Finding 4) "Since that date to the present time, Highlanders, Inc. has not been an operating entity." (**ibid.**)

No hearing was ever held on the asserted plans for a Chapter XI Arrangement, and each of the plans was therefore effectively abandoned (as if actually rejected) under the provisions of Section 776, Chapter XI (Bankruptcy Act of 1938) (See p. 6, **supra**).

However, as if purposefully following Section 776(1) of Chapter XI (**op. cit.**), Bankruptcy Judge Moriarty actually entered "its order dismissing Chapter XI proceedings . . ." (Appendix (i), Finding 6). This occurred nominally on November 7, 1968 (**ibid.**). At the same time, without any proper hearing as required by the Due Process Clause of Amendment V to the Constitution fo the United States, Referee Calverley adjudicated Highlanders a bankrupt. (**ibid.**)

Highlanders finally succeeded in gaining a hearing by the United States District Court on March 15, 1973. The District Court on March 23, 1973 denied the petition for review and reaffirmed the order of the referee adjudicating Highlanders a bankrupt (Appendix (i), Findings 15, 16, 17, and 18).

Highlanders timely appealed the District Court's March 23, 1973 Judgment to the Court of Appeals for The Ninth Circuit on the primary ground that the bankruptcy court had never acquired jurisdiction over Highlanders because a single joint involuntary petition in bankruptcy could not be lawfully filed under Section 4(b) of the 1938 Bankruptcy Act against an individual and a separate, distinct and unrelated corporation.

The Court of Appeals for the Ninth Circuit in its May 30, 1975, Memorandum Opinion **held that the question before the court did not go to the bankruptcy court's juris-**

diction over Highlanders but was a procedural blunder of misjoiner.

That May 30, 1975 Memorandum Judgment, as quoted in Bankruptcy Judge Moriarty's February 6, 1978 Findings of Fact, stated in full:

> "The misjoiner of the individual Highley with the corporation in a single petition, for which two filing fees were paid, followed by personal service on the corporation, **was not a jurisdictional defect. (Cf. In re Hudlik-Ross Co.** (sic) (S.D.N.Y. 1961), 198 F.Supp. 695, aff'd, 297 F.2d 32; Rule 21, Fed. R. Civ. P.). The subsequent events during the intervening seven years foreclose appellant from any possibility of successful attack upon the procedural blunder. AFFIRMED."
> (Emphasis supplied) (Appendix (i), Finding 19).

Highlanders' petition for a rehearing and suggestion for hearing en banc were denied and rejected on July 24, 1975.

Petitioners then accepted the 1975 Judgment of the court of appeals, concluding that the question of the bankruptcy court's jurisdiction over Highlanders had never been in issue. Such was the clear ruling of the court of appeals in its 1975 decision.

Relying appropriately upon the supposed integrity of David A. Gill and the knowledgeable law firm of Danning and Gill, the officers of the bankruptcy court who had prepared and filed the September 2, 1966 amended involuntary petition, as well as the initial June 23, 1966 involuntary petition in bankruptcy, Petitioners never suspected, nor had any reason to suspect, that these lawyers would defile the bankruptcy court, the District Court, and the Court of Appeals, and would debauch the

entire judicial process by preparing and actually filing an amended involuntary petition in bankruptcy on which the signatures of at least two of the required three "petitioning creditors" were counterfeit.

In October, 1976, however, prompted by the receipt of a bill for legal services allegedly incurred by her in a state court action, Lawrence contacted Petitioner, Emanuel M. Comora ("Comora" herein) President of Highlanders, Inc. and told him that she had not signed, authorized, or previously known of the use of her counterfeit signature on the amended petition or on any other documents subsequent to June 23, 1966, and had not seen or had any communication with any person connected with the Danning and Gill law firm since June 23, 1966.

Comora, acting on behalf of Highlanders, obtained Lawrence's declaration under penalty of perjury on October 10, 1976, confirming these statement. The declaration was ioncorporated by Lawrence in her subsequent affidavit.

Because of the information given him by Lawrence, Comora contacted Fitzner. She told Comora that she, too, had not signed, authorized, or known of the use of her fake signature which appeared on the amended involuntary petition. Fitzner made an affidavit on October 22, 1976, and a supplemental declaration on November 8, 1976. These affidavits were filed with the bankruptcy court and were before it for hearing as early as February 10, 1977. Thus, at that time they were known to the culpable officers of the court, David A. Gill and the law partnership of

Danning & Gill and the Trustee, Don Rothman. (Appendix (i), Finding 27).

The same affidavits of Lawrence and Fitzner were presented to the bankruptcy court, and hence to lawyers David A. Gill and Danning and Gill, on October 13, 1977, when Petitioners filed their Motion To Vacate and Set Aside The Involuntary Petition In Bankruptcy, etc. (78-2812) (Appendix (i), Finding 41).

Petitioners' Motion to Vacate, etc., was heard by referee Moriarty on December 8, 1977. No evidence was presented by David Gill, Danning and Gill or the Trustee to refute the truth or veracity of the assertions made by Lawrence or Fitzner in their Affidavits and declarations.

The legal base for the jurisdiction of the federal bankruptcy court in the first instance were Article I, Section 8, Clause 4, The Constitution of the United States and the 1938 Bankruptcy Act, Section 4(b), both of which are set forth verbatim at page 5 of this petition, **supra.**

REASONS FOR GRANTING THE WRIT

1. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT MISTAKENLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH ENTAILS THE PUBLIC INTEREST BY AFFIRMING THE BANKRUPTCY COURT'S REFUSAL TO GRANT PETITIONERS' MOTION TO VACATE AND SET ASIDE AN INVOLUNTARY BANKRUPTCY PROCEEDING WHERE THE LAWYERS REPRESENTING THE SUPPOSED PETITIONING CREDITORS KNOWINGLY COMMITTED AN OUTRAGEOUS FRAUD UPON THE COURT BY CREATING AND PERPETRATING BANKRUPTCY JURISDICTION BY THEIR PREPARATION AND FILING OF A BOGUS INVOLUNTARY PETITION IN BANKRUPTCY IN WHICH THE SIGNATURES OF TWO OF THE THREE "PETITIONING CREDITORS" WERE UNDENIABLY COUNTERFEIT.

a. THE APPELLATE COURT'S JUDGMENT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, Rule 17.1. (c)

The basic principle established by this Court with which the decision of the Court of Appeals for the Ninth Circuit is in conflict was definitively restated and strictly applied in **Hazel-Atlas Glass Co. v. Hartford-Empire Co.**, 322

U.S. 238 (1944). In that case, this Court held that where a judgment is obtained through fraud perpertrated upon the court by an attorney at law in a matter which entails the public interest, the integrity of the judicial process is so outrageously offended that the judgment must be set aside even though many years have passed since the final judgment was entered.

Because it is the public interest in the integrity of the courts which is of paramount concern, the judgment obtained through a fraud upon the court cannot be allowed to stand by resort to the rules of laches, waivers, or the doctrines of collateral estoppel or **res judicata.**

Mr. Justice Black, speaking for this court in **Hazel-Atlas, supra,** stated (322 U.S. at 248):

> "Equitable relief against fraudulent judgment is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardship which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all relief necessary to correct the particular injustices involved in these situation."

While Mr. Justice Roberts, joined by Chief Justice Stone and Associate Justices Reed and Frankfurter, disagreed with the procedural result, suggesting the case should be sent back to the Diustrict Court for a "deliberate and orderly trial of the issues" of fraud upon the court,

he emphasized at the beginning of his dissenting opinion the unanimity of the Court "in condeming the transaction disclosed." He said (**Hazel-Atlas, supra,** 322 U.S. at 251):

> "No fraud is more odious than an attempt to subvert the administration of justice . . . Our problem is how best the wrong should be righted and the wrongdoers pursued." **(ibid.)**

Although **Hazel-Atlas, supra,** was a patent case and the fraud was an article attributed to a "former President of the Glass Workers' Union" (322 U.S. at 241) **but actually prepared by one of Hartford's attorneys** (322 U.S. at 240, 241-243), the Court's opinion in **Hazel-Atlas** clearly makes the principle quoted above from 322 U.S. at 250 applicable to all cases which entail the public's interest.

Through not the basis of the Court's decision, that principle was made clear by the following statement of Mr. Justice Douglas, writing the Opinion of the Court in **S & E Contractors v. United States,** 406 U.S. 1 (1972), a government contract case which did not involve a patent. There the Court noted that (406 U.S. at 15):

> "Even where the contractor has obtained a judgment and the time for a review of it has expired fraud on an administrative agency or on the court enforcing the agency action is ground for setting aside the judgment. (citing and quoting from **Hazel-Atlas, supra,** at 245) * * * Contracts with the United States—like patents—are matters concerning far more than the interest of the adverse parties; they entail the public

interest (citing and quoting from **Precision Co. v. Automotive Co.,** 324 U.S. 806, 815 (1945)."

Particularly in point here is **Marshall v. Holmes,** 141 U.S. 589 (1891) cited in support of the Opinion of the Court in **Hazel-Atlas, supra,** at 322 U.S. 244 and 246, which held the rule of equity should be applied where judgments had been obtained against a petitioner who had been a defendant in an action in law founded upon alleged contracts for supplies. After the judgment at law had become final, the petitioner discovered evidence of conspiracy to defraud and forgery "which was unknown to petitioner at the time of the trial and could not have been known to or anticipated by her" because the plaintiff in the law action had used false evidence and a forged document in obtaining the defective judgment.

Prior to **Hazel-Atlas, supra,** the Court held in **United States v. Johnson,** 319 U.S. 302 (1943) in a case involving property within a "defense rental area," pursuant to the Emergency Price Control Act of 1942, that the district court "should have granted the . . . motion to dismiss the suit as collusive" where one of the several necessary parties and the attorney purportedly representing all of them dominated the proceedings about which the unaware, nominal, but necessary, parties have no knowledge because "the public interest has been placed at hazard by the amenities of parties to a suit conducted under the domination of only one of them" (319 U.S. at 305)

The present case is similar. Here the two sham petition-

ing creditors, Lawrence and Fitzner, declared under oath by uncontradicted affidavits supoported Petitioners' Motion To Vacate And Set Aside The Involuntary Bankruptcy Petition that they had not signed, and until 1976, had no knowledge of, the September 1966 Amended Petition which was prepared and filed by attorney David Gill as counsel for the "petitioning creditors."

Apparently Sanitek Products, Inc., David Gill and his law firm of Danning and Gill were the parties of real concern in these still-active, obviously fraudulent bankruptcy proceedings.

b. THE APPELLATE COURT'S JUDGMENT HERE IS IN CONFLICT WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT. (Rule 17.1.(a))

As support for the statement by Mr. Justice Black, which went to the esence of the **Hazel-Atlas** principle that "... where enforcement of the judgment is manifestly unconscionable . . . 'they (the courts) have wielded the power (to vacate the fraudulently obtained judgment) without hesitation;' " **Publicker v. Shallcross,** 106 F.2d 949, 126 ALR 386 (3d Cir., 1939) was cited with approval (**Hazel-Atlas, supra,** at 238 U.S. 245, n. 1.)

In the **Publicker** case, **supra,** a corporate receivership, one debtor of the defunct corporation fraudulently induced the receiver, two corporate bondholders, a special master, and the district court to believe that his total

assets were $8,500.00, whereas in truth he had total assets worth $230,000. This fraud was accomplished by perjurious concealment. On the basis of that fraudulent misrepresentation, he was able to compromise the claim against him for one cent on the dollar. Two years after the order authorizing the compromise settlement, a suit in equity was brought to set aside the compromise agreement because of the fraud. The district court entered a decree vacating the initial decree which authorized the release of the $8,500.00 claim against **Publicker, supra.**

On appeal, **Publicker** did not contest the accusation of the fraudulent perjurious concealment but argued "that the order authorizing the compromise cannot be vacated after a lapse of two years simply because he perjuriously concealed his true financial condition." **(Publicker v. Shallcross, supra,** at 106 F.2d 949)

The court of appeals, recognizing a conflict between **United States v. Throckmorton,** 98 U.S. 61 (1878) and **Marshal v. Holmes, supra,** followed the later case and afirmed the decision of the district court which had vacated the prior order fraudulently obtained by **Publicker.** In its opinion, the appellate court noted that:

> "... petitioners' perjury not only misled the receivers, but impinged directly upon the administration of justice." **Publicker, supra,** at 106 F2d 951.)

The Supreme Court denied certiorari, 308 U.S. 624 (1940). **Cf. Schum v. Bailey,** 578 F.2d 493 at 499-506 (3d Cir. 1978).

c. WHERE, AS HERE, THE FRAUD UPON THE COURT IS ACCOMPLISHED BY AN OFFICER OF THE COURT, IT CANNOT BE TOLERATED. IN VIOLATING THIS PRINCIPLE THE COURT OF APPEALS FOR THE NINTH CIRCUIT IS IN CONFLICT WITH THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

One of the important aspects of the fraud perpetrated upon the court, **Hazel-Atlas, supra,** (322 U.S. at 240, 241, 242, 247)and also undeniably present in the case now presented to this Court for review upon certiorari is the participation of attorneys active in effecting the fraud.

It is emphasized in **7 Moore's Federal Practice, ¶.** 60.33 at 513, that under **Hazel-Atlas, supra** (see 322 U.S. at 240, 241, 242, 247) where the fraud is committed by an attorney, it is ipso jure therefore a fraud upon the court. In discussing the **Hazel-Atlas** doctrine and distinguishing it from **United States v. Throckmorton,** 98 U.S. 61 (1878), Moore comments (¶60.33 at 513):

> "One point of difference, although not stressed by the Court in **Hazel-Atlas,** is that an attorney of Hartford was implicated in perpetrating the fraud. We believe that this is important, for an attorney is an officer of the court. While he should represent his client with singular loyalty that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case her perpetrates a fraud upon the court."

A case of such outrageous fraud is **Root Refining Co. v., Universal Oil Products Co.,** 169 F.2d 514 (1948). There the Court of Appeals for the Third Circuit was compelled to vacate the district court's and its own prior judgment because the prior prevailing parties had employed a lawyer, and associated him with those who had actually handled the litigation, because of his intimacy with and influence over Circuit Judge J. Warren Davis.

See also **Kupferman v. Consolidated Research & Mfg. Corp.,**459 F.2d 1072, 1078 (2d Cir. 1972); **Martina Theater Corp. v. Schine Chain Theaters, Inc.,** 278 F.2d 798, 801 (2d Cir., 1960).

Dealing specifically with the precise question presented here, **Wyman v. Newhouse,** 93 F.2d 313, 315 (2d Cir., 1937) held where, as in the present case, the jurisdiction of the court is gained by a fraud perpetrated upon the court, the court "lacks jurisdiction" and the "judgment... is null and void."

The Supreme Court denied certiorari, 303 U.S. 604.

d. THE FRAUD UPON THE COURT ALSO COMES WITHIN THE PROVISION OF RULE 60(b)(6) FEDERAL RULES OF CIVIL PROCEDURE, WHICH CALLS FOR REVIEW BY CERTIORARI.

In a bankruptcy proceeding, particularly where, as here, the matter is still before the Bankruptcy Court, and the Bankruptcy Court's rulings and adjudications are void, a motion to vacate the entire proceedings, including the "adjudication of bankruptcy is not a collateral but a direct

attack. The motion to vacate "because of some equitable ground **or jurisdictional** defect * * * is a power inherent in a court of authority, and Bankruptcy Rule 924 does expressly provide for relief from a judgment or order of the court in bankruptcy cases by incorporating Rule 60 of the Federal Rules of Civil Procedure* * *.

Procedurally, Petitioners' "Motion To Vacate The Bankruptcy Proceedings, etc. Because of Fraud Upon The Court" was proper whether it be considered as a motion under the equitable rule in a still pending matter, similar to a bill of review under the court's inherent powers to correct a fraud upon the court or is predicated upon Rule 60(b), Federal Rules of Civil Procedure.

This is so because petitioners' "Motion To Vacate And Set Aside Voluntary Petition In Bankruptcy, etc.," filed October 13, 1977, was based, and supported by argument, on Rule 60(b), Federal Rules of Civil Procedure (1946), as well as upon the inherent power of the court to correct a fraud upon the court as defined by **Hazel-Atlas, supra.**

Petitioners submit that the fraud in obtaining jurisdiction perpetrated by the lawyers who prepared and engineered the counterfeit signatures of Lawrence and Fitzner and who fraudulently filed the fake amended involuntary petition on September 2, 1966, with the bankruptcy court, was designed for the purpose of their gain at the expense of defiling the court and debauching the integrity of the judiciary and the confidence of the public. If, however, the jurisdictional fraud be viewed as

one which did not quite corrupt the bankruptcy and appellate courts, it still is a ground which requires redress under Rule 60(b)(6).

In **Bizzell v. Hemingway,** 548 F.2d 505, 507 (4th Cir., 1977), the court held that where a judgment in a bankruptcy proceeding is obtained as the result of fraud employed by attorneys in the case, Rule 60(b)(6) of the Federal Rules of Procedure expressly preserves the district court's power to set aside the judgment.

e. THE 1975 OPINION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IS NEITHER A GROUND FOR DENYING PETITIONERS' MOTION BECAUSE OF RES JUDICATA OR COLLATERAL ESTOPPEL.

The court of appeals stated as the primary ground for its decision:

> "We have reviewed the transcript of the hearing before the bankruptcy judge. He found that the bankruptcy adjudication was not fraudulently commenced. That finding is not clearly erroneous." (Appendix (iv) at 2, lines 19-23)

At the hearing on Petitioners' Motion to Vacate, etc. on December 8, 1977, no evidence was presented by the officers of the Court, David Gill, Danning & Gill or by the Trustee or anyone else to refute or question the truth or veracity of the affidavits or declarations presented by Lawrence and Fitzner which asserted their signatures were counterfeit and that the

lawyers David Gill and Danning & Gill had perpetrated a fraud on the court. Thus, there is no support for the statement made by the appellate court. (Appendix (iv) at 2, lines 19-23) The appellate court cites no authority—either legal or factual—for that determination. It is therefore necessary to examine the bankruptcy court's February 3, 1978 **Findings of Fact and Conclusions of Law"** (Appendix (i) at 39) so that the reason for the rule established by the appellate court's judgment can be determined.

The only two pertinent Conclusions of Law entered by the bankruptcy judge state:

> "2. Highlanders, Inc. and Emanuel M. Comora are estopped by their conduct throughout these bankruptcy proceedings from now contending that the involuntary petition, these proceedings, and the adjudication of Highlanders, Inc., as a bankrupt should be vacated.
>
> 3. The contentions raised by Highlanders, Inc. and Emanuel M. Comora in their Motion to Vacate and Set Aside Involuntary Petition in Bankruptcy, Bankruptcy Proceedings, and Adjudication of Highlanders, Inc., As a Bankrupt, And For An Accounting, are barred by the principles of collateral estoppel and **res judicata.**"

The May 30, 1975 MEMORANDUM OPINION of the Court of Appeals for the Ninth Circuit, **supra,** primarily and specifically relied upon by the bankruptcy judge in his decision of February 3, 1978, **supra,** thus can be the sole

primary predicate of the district court's affirmation of the bankruptcy court's order and the subsequent judgment of the Court of Appeals for the Ninth Circuit. Neither the principle of **res judicata** nor the equitable doctrine of collateral estoppel can be invoked to support the appellate court's 1980 judgment.

The Court of Appeals for the Ninth Circuit in its May 30, 1975, MEMORANDUM OPINION definitely held that there was no question of jurisdiction before the court. Rather, the court ruled that the sole question presented and considered was a matter of non-fatal misjoinder of parties under **In re Hudik-Ross Co.,** 198 F. Supp. 695 (S.D.N.Y. 1961). That case was essentially involved with venue and did not involve any jurisdictional question. See **1 Collier On Bankruptcy** (14th ed. 1978): 2.19(2) n.9; 2A id.: 32,02(1) n. 17(b); 8 id. 4.02 (3) n. 17; 13 id. 721.01, 721.02.

In this context, and considering the reliance of the appellate court, the district court, and the bankruptcy court upon the principle of **res juricata** and collateral estoppel, a re-examination of the rationale of **Hazel-Atlas, supra,** exposes the fallacy of the appellate court's reasoning and consequent conclusion.

f. THE SUPPOSED PLANS OF A CHAPTER XI ARRANGEMENT CAN NEITHER CREATE JURISDICTION IN THE BANKRUPTCY COURT NOR CONSTITUTE A WAIVER OF PETITIONERS' RIGHT TO HAVE THE

PROCEEDINGS VACATED BECAUSE OF THE LAWYERS' FRAUD UPON THE COURT WHICH INITIALLY CREATED A SHAM JURISDICTION.

The bankruptcy court, the district court, and the court of appeals by their affirmance also rested the denial of Petitioners' timely "Motion To Vacate and Set Aside The Involuntary Bankruptcy Proceedings, etc. Because of Fraud Upon The Court" upon the ground that Petitioners had waived any right they had to object to the fraud committed on the bankruptcy court. (Appendix (iv) at p.1)

These supposed, but abortive plans were filed at least nine years prior to the time the fraudulent filing of the September 2, 1966, counterfeit petition was or reasonably could have been discovered by Petitioners.

The bankruptcy court cannot acquire jurisdiction where the involuntary petition in bankruptcy was fraudulently filed by officers of the court through the device or under the guise of the filing of a plan for a Chapter XI arrangement which was abndoned. This is made clear from the thorough discussion in **9 Collier On Bankruptcy,** Par. 10.01-10.03 at 507-513 (14th Edition).

The Court of Appeals for the Ninth Circuit in **Patapoff v. Vollstedt's Inc.,** 267 F.2d 863 (9th Cir., 1959) held under Rule 60(b)(1)(6), that the court cannot create or accede to jurisdiction falsely or fraudulently acquired, or waive the right to a valid defense when at the time the involuntary bankruptcy proceeding was begun, the

alleged bankrupt was unaware or misled as to the existence of the viable and sound defense to the involuntary bankruptcy proceedings. See also **In re Barasch,** 439 F.2d 1393 (9th Cir., 1971) where, as here, the alleged debtor's title was in dispute at the time the abortive Chapter XI plan was filed. In addition, as made clear by the Bankruptcy Judge (See **Statement of Case** at p.), the alleged Chapter XI plans were abandoned and formally rejected by the referee.

2. CERTIORARI SHOULD BE GRANTED SO THAT THE WRONGFULLY AND UNFOUNDED SANCTIONS MAY BE VOIDED.

Finally, the appellate court imposed sanctions upon Petitioners (of double costs and attorney's fees) without having any findings made by the appellate court, the district court, or the bankruptcy court, as required by the most recent decision in **Roadway Express, Inc. v. Piper,** _____ U.S. _____ , 100 Sp. Ct. 2455 at 2465 65 L.ed 2d 488 at 502 (No. 79-701, June 23, 1980,) where this Court specifically held:

> "Since the District Court did not consider the costs and fees that Roadway might recover under Rule 37, that question must be addressed on remand. Similarly, **the trial court did not make a specific finding as to whether counsel's conduct in this case constituted or was tantamount to bad faith, a finding that would have to procede any sanction under the court's inherent powers.** The case is

remanded to the Court of Appeals with directions to return it to the District Court for proceedings consistent with this opinion." (Emphasis supplied)

In this case, the district court, in its June 19, 1978, Judgment upholding Bankruptcy Judge Moriarty's Order of February 6, 1978, specifically declined to rule upon the Respondents' request for sanctions (Appendix (iii)). The record shows that in no case before the court of appeals was there any finding by any court as to bad faith conduct as required by the **Piper** case, **supra.**

CONCLUSION

For the reasons stated, the Petition For Certiorari should be granted so that the questions presented which come under Rule 17, Rules of the Supreme Court of the United States (Effective June 30, 1980) may be reviewed by the Supreme Court and the Judgment of the Court of Appeals For The Ninth Circuit may be reversed.

Respectfully submitted,

Donald R. Colvin
Counsel for Petitioners
Member of the Bar
of the United States
Supreme Court

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
PURSUANT TO RULE 21, 1.(K)
(effective June 30, 1980)

APPENDIX (i)

(Pertinent Excerpts)

GENDEL, RASKOFF, SHAPIRO & QUITTNER
ATTORNEYS AT LAW
1801 Century Park East - 6th Floor
Los Angeles, California 90067
(213) 277-5400

Attorneys for DON ROTHMAN, TRUSTEE

RECEIVED
JAN 27 1978
Clerk U.S. District Court
Central District of California

FILED
FEB 3 1976

ENTERED
FEB 6 1978
CLER, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In re GEORGE C. HIGHLEY, individually, etc, and HIGHLANDERS, INC., etc., Bankrupts.	) Bankruptcy No. 213,105-JWC JM) FINDINGS OF FACT AND CONCLUSIONS OF LAW ON MOTION TO VACATE AND SET ASIDE INVOLUNTARY PETITION IN BANKRUPTCY, BANKRUPTCY PROCEEDINGS, AND ADJUDICATION OF HIGHLANDERS, INC. AS A BANKRUPT, AND FOR AN ACCOUNTING
HIGHLANDERS INC. AND EMANUEL M. COMORA, Movants, -vs- DON ROTHMAN, TRUSTEE, AND PETITIONING CREDITORS DOLORES LAWRENCE, GRACE M. FITZNER, AND SANITEK PRODUCTS, INC. Respondents.	)

The motion by Highlanders, Inc. the bankrupt herein, and by Emanuel M. Comora, the sole shareholder of Highlanders, Inc., to vacate and set aside involuntary petition, bankruptcy proceedings and adjudication of Highlanders, Inc. as a bankrupt, and for an accounting, duly came on for hearing before the undersigned bankruptcy judge on December 8, 1977. Highlanders, Inc. and Emanuel M. Comora appeared by their counsel, Donald R. Colvin, Esq. and Emanuel M. Comora was present personally. Don Rothman, Trustee in Bankruptcy for Highlanders, Inc., appeared by his counsel, Gendel, Raskoff, Shapiro & Quittner by Richard S. Berger, Esq., and Lawrence Bass, Esq.

The court, having considered the moving papers and the opposition thereto, having heard argument of counsel, and having taken judicial notice of the entire file in this bankruptcy proceeding, including the appeals taken from rulings made therein to the United States District Court for the Central District of California and to the United States Court of Appeal for the Ninth Circuit and of plenary actions commenced by Highlanders, Inc. and/or Emanuel M. Comora in the United States District Court for the Central District of California and in the Superior Court of the State of California for the County of Los Angeles, and good cause appearing therefore, now makes the following

FINDINGS OF FACT

1. On June 23, 1966, an involuntary petition in bankruptcy was filed against George C. Highley ("Highley") and against Highlanders, Inc. Highley eventually consented to being adjudicated a bankrupt; his adjudication became final and has not been in issue at any time. A.J. Bumb became the receiver of Highlanders.

2. On or about July 11, 1966, Highlanders, Inc. voluntarily filed a petition for an arrangement under Chapter XI of the Bankruptcy Act pursuant to the provisions of Section 321 of the Bankruptcy Act, 11 U.S.C. §721. In that petition, Highlanders, Inc. consented tro the jurisdiction of the bankruptcy court and further consented to its jurisdiction in bankruptcy in the following language:

> "Petitioners, and each of them, are unable to pay their debts as they mature, and intend to propose an arrangement pursuant to the provisions of Chapter XI of the Bankruptcy Act (11 U.S.C. Sections 701-709). In the event that the Plan or Plans of Arrangements to be submitted by them are not confirmed, and if confirmed, not consumated, they, and each of them, consent to the adjudication in bankruptcy of each of them at such time."

3. During 1967, Highlanders, Inc. through its counsel and through Dr. Comora, acting as an officer of Highlanders, Inc., proposed three different Plans of Arrangement to its creditors. None of the proposed plans obtained

sufficient consents of creditors to be confirmed.

4. On January 31, 1968, the receiver filed an application to sell property at a private sale, which application sought to transfer substantially all of the assets of Highlanders, Inc. to Barbara Olsan and San Fernando Valley Medical Center, subject to certain liens. That sale of assets was approved by an order dated January 31, 1968, and the receiver thereupon ceased operating the sanitarium theretofore owned by Highlanders, Inc. and turned it over to the purchasers. Since that date to the present time, Highlanders, Inc., has not been an operating entity.

6. On September 9, 1968, the bankruptcy court, **sua sponte** and upon notice to all creditors including Emanuel M. Comora and his corporate entities, set October 9, 1968 for a hearing to determine whether Highlanders, Inc. should be adjudicated a bankrupt. Following several hearings, on November 7, 1968, the court made and entered its Findings of Fact and Conclusions of Law upon motion to adjudge Highlanders, Inc. bankrupt and its Order dismissing Chapter XI proceedings and ajudging Highlanders, Inc. a bankrupt.

15. Following the disqualification of Mr. Leff and his law firm, Emanuel M. Camora engaged Jessee Hamilton, Esq., to represent Highlanders, Inc. On July 31, 1972, Mr. Hamilton, on behalf of Highlanders, Inc. filed a Motion to Vacate Adjudication and to Dismiss Proceeding. The only ground for vacation and dismissal asserted in that motion was that which had previously been ruled upon by both this court and the District Court; namely, that the pro-

ceedings were null and void in light of the fact that a single joint involuntary petition was filed without an accompanying allegation that Highley and Highlanders, Inc. were partners.

16. On October 11, 1972, this Court entered an Order denying the Motion to Vacate Adjudication and to Dismiss Proceeding.

17. On October 20, 1972, Mr. Hamilton, on behalf of Highlanders, Inc., filed a petition for review of this Court's October 11, 1972 Order. Additionally, on February 27, 1973, Mr. Hamilton, in association with Donald R. Colvin, Esq., present counsel of record for Highlanders, Inc., filed a Motion to Remand These Proceedings to the Referee For (1) Consideration of Whether Highlanders, Inc. is Being Deprived of its Property Without Due Process of Law, etc.; (2) Dismissal of These Proceedings as to Highlanders, Inc., and (3) A Declaration That All Actions Taken in These Proceedings Against or Disposing of The Property, Or Affecting The Rights of Highlanders, Inc. Are Nullified and Void Ab Initia.

18. The petition for review and motion to remand came on for hearing before the United States District Court on March 15, 1973. On March 23, 1973, the District Court entered its Order denying petition for review and affirming order of referee. In that Order, the District Court found that the motion to remand was improperly filed and said motion was thus denied and dismissed.

19. Highlanders, Inc., represented by Mr. Colvin, appealed the District Court's Order of March 23, 1973 to

the United States Court of Appeal for the Ninth Circuit. On May 30, 1975, in a memorandum opinion, the Ninth Circuit ruled as follows:

> "The misjoinder of the individual Highley with the corporation in a single petition, for which two filing fees were paid, followed by personal service on the corporation, was not a jurisdictional defect. **(Cf. In re Hudlik-Ross Co.** (S.D.N.Y. 1961), 198 F.Supp. 695, aff'd, 297 F.2d 32; Rule 21, Fed. R. Civ. P.). The subsequent events during the intervening seven years foreclose appellant from any possibility of successful attack upon the procedural blunder. AFFIRMED."

27. On January 20, 1977, Highlanders, Inc. Cybertronics Corproation and Emanuel M. Comora, appearing through their attorney Mr. Hamilton, filed before this Court a Motion to Sever and Drop Highlanders, Inc., From These Proceedings (Rule 21 of the Federal Rules of Civil Procedure) Subject to Such Terms As Are Just, and their Motion and Application to Remove Trustee For Cause Under Bankruptcy Rule 221(a) and Section 2a(17) of the Bankruptcy Act (1) U.S.C.A. Sec. 11a(17). The Motion to Remove Trustee was in all respects identical to the similarly titled motion filed before this Court on November 21, 1975, the appeal from the denial of which was (and still is) pending before the United States Court of Appeal for the Ninth Circuit. The Motion to Sever and Drop was based upon alleged fraud in the inception of the involuntary bankruptcy proceedings in June of 1966. In support of the Motion to Sever and Drop, and attached thereto, were (1) an affidavit by Dolores E. Lawrence, dated

October 10, 1976, (2) an affidavit of Grace M. Fitzner, dated October 22, 1976, and (3) an supplemental declaration of Grace M. Fitzner, dated November 8, 1976.

41. on October 13, 1977, Highlanders, Inc. and Emanuel M. Comora, again appearing through their attorney, Donald R. Colvin, Esq., filed a Motion to Vacate and Set Aside Involuntary Petition in Bankruptcy, Bankruptcy Proceedings, and Adjudication of Highlanders, Inc., as a Bankrupt, and For An Accounting Therein. Attached as exhibits to that motion were the declaration of Dolores E. Lawrence, dated October 10, 1976, the declaration of Grace M. Lawrence (sic) dated October 22, 1976, and the supplemental declaration of Grace M. Fitzner, dated November 8, 1976. Those declarations were identical in all respects to the declarations attached to the complaint filed before this Court on August 1, 1977, the Motion to Sever and Drop, filed on January 20, 1977.

45. There is no basis or support for the allegation that the signatures of the petitioning creditors were forged upon the amended petition in involuntary bankruptcy filed herein on September 2, 1966.

46. There is no basis or support for the allegation that the filing of an amended petition in involuntary bankruptcy against Highlanders, inc. on September 2, 1966 was fraudulent or perpetrated a fraud against Highlanders, Inc. or this Court.

49. By filing a petition for an arrangement under Chapter XI of the Bankruptcy Act, Highlanders, Inc. and Emanuel M. Comora consented to the jurisdiction of the

bankruptcy court and expressly consented to the adjudication of Highlanders, Inc. as a bankrupt in a plan of arrangement were not confirmed or, if confirmed, not consummated.

50. Insofar as any of the hereinafter detailed Conclusions of Law constitute Findings of Fact, the same are incorporated herein by this reference.

CONCLUSIONS OF LAW

1. The foregoing Findings of Fact, insofar as they may constitute Conclusion of Law, are incorporated herein by this reference.

2. Highlanders, Inc. and Emanuel M. Comora are estopped by their conduct throughout these bankruptcy proceedings from now contending that the involuntary petition, these proceedings, and the adjudication of Highlanders, Inc., as a bankrupt should be vacated.

3. The contentions raised by Highlanders, Inc. and Emanuel M. Comora in their Motion to Vacate and Set Aside Involuntary Petition in Bankruptcy, Bankruptcy Proceedings, and Adjudication of Highlanders, Inc., As a Bankrupt, and For An Accounting, are barred by the principles of collateral estoppel and **res judicata.**

4. The Motion to Vacate and Set Aside Involuntary Petition in Bankruptcy, Bankruptcy Proceedings, and Adjudication of Highlanders, Inc. As a Bankrupt, and For An Accounting, must be denied.

DATED: February 3, 1978; 4:30 p.m.

ss: James Moriarty
Bankruptcy Judge

APPENDIX (ii)

GENDEL, RASKOFF, SHAPIRO & QUITTNER
ATTORNEYS AT LAW
1801 Century Park East - 6th Floor
Los Angeles, California 90067
(213) 277-5400

Attorneys for Don Rothman, Trustee

ENTERED
FEB 6 1978
Clerk U.S. District Court
Central District of California

FILED
FEB 8 1978
Clerk U.S. DISTRICT COURT
Central District of California

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In re GEORGE C. HIGHLEY, individually, etc., Bankrupt. HIGHLANDERS, INC., Bankrupt.	Bankruptcy No. 213105-JWC-JM ORDER UPON MOTION TO VACATE AND SET ASIDE INVOLUNTARY PETITION IN BANKRUPTCY, BANKRUPTCY PROCEEDINGS, AND ADJUDICATION OF HIGHLANDERS, INC. AS A BANKRUPT, AND FOR AN ACCOUNTING THEREIN
HIGHLANDERS, INC. and EMANUEL M. COMORA, Movants, vs. DON ROTHMAN, Trustee, and Petitioning Creditors, DOLORES LAWRENCE, GRACE M. FITZNER, and SANITEK PRODUCTS, INC. Respondents.	

At Los Angeles, California, in said District, this 3 day of February, 1978;

The above-captioned Motion came on regularly for hearing before the undersigned Bankruptcy Judge on December 8, 1977. The moving parties appeared by their counsel, Donald R. Colvin; the Trustee appeared by his counsel, Gendel, Raskoff, Shapiro & Quittner by Richard S. Berger and Lawrence Bass; the Petitioning Creditors appeared by their counsel, Danning, Gill, Michaelson & Gould by Richard Diamond. The Court having considered the pleadings on file herein and having heard the statements of counsel and having made and entered its Findings of Facta and Conclusions of Law and based thereon, it is hereby

ORDERED that the MOTION TO VACATE AND SET ASIDE INVOLUNTARY PETITION IN BANKRUPTCY, BANKRUPTCY PROCEEDINGS, AND ADJUDICATION OF HIGHLANDERS, INC. AS A BANKRUPT, AND FOR AN ACCOUNTING THEREIN be, and it is hereby denied with prejudice.

4:30 p.m.

ss: James G Moriarty
BANKRUPTCY JUDGE

APPENDIX (iii)

CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No. CV 78-598-JWC Date 6-19-78

Title IN RE GEORGE C. HIGHLEY etc. Bankrupt

DOCKET ENTRY

FILED
JUN 19 1975
Clerk U.S. District Court
Central District of California

PRESENT:

HON. JESSE W. CURTIS. Judge DELIA C. SAY
DAVID D. ZASTOUPIL Court Reporter
Deputy Clerk

ATTORNEYS PRESENT FOR PLAINTIFFS
DONALD R. COLVIN
ATTORNEYS PRESENT FOR DEFENDANTS:
LAWRENCE BASS

PROCEEDINGS:

IT IS ORDERED, that the appeal by Highlanders, Inc. & Emanuel M. Comora of the Order of Judge Moriarty entered February 6, 1978, denying motion to vacate & set aside involuntary petition in bankruptcy is dismissed. and the matter of imposition of addition sanctions is taken under submission.

Initials of Deputy Clerk dz

APPENDIX (iv)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE:
GEORGE C. HIGHLEY,
individually, etc.
Bankrupt,
HIGHLANDERS, INC.,
Bankrupt,

HIGHLANDERS, INC., ET AL,
Plaintiffs/Appellants,
v.
DON ROTHMAN, TRUSTEE,
Defendants/Appellee,

HIGHLANDERS, INC., a
California corporation, and
EMANUEL M. COMORA,
Individually,
Plaintiffs/Appellants,
v.
DON ROTHMAN, etc.;
SANITEK PRODUCTS, INC.,
etc; GRACE FITZNER;
DOLORES LAWRENCE;
ROBERT SNYDER; BERNARD
SHAPIRO, ET AL,
Defendants/Appellees.

FILED
MAR 24 1980
RICHARD DEANE
Clerk, U.S. Court of Appeals

Nos. 78-2810
78-2811
78-2812
79-3024
79-3033
79-3157

MEMORANDUM

No. 78-1767

MEMORANDUM

Appeal from the United States District Court
for the Central District of California

Before: WALLACE and SCHROEDER, Circuit Judges and HANSON*, District Judge

These appeals concern an adjudication of bankruptcy entered in 1968. The gravamen of plaintiffs' complaints in most of these cases is that they were somehow prevented from showing that the underlying bankruptcy adjudication was procured by fraud. Plaintiffs have had repeated opportunities to produce evidence supporting that claim and have failed to do so. Previous challenges to the bankruptcy adjudication have been denied in both the California state courts and in the federal courts. we today dispose of all the remaining challenges.

We conclude that all of these appeals are frivolous and assess sanctions against plaintiffs for bringing them.

II. No. 78-2812

In this case plaintiffs allege that the 1968 adjudication of bankruptcy was invalid because the involuntary petition in bankruptcy contained forged signatures of persons who purported to be creditors but were not. The same claim is made in No. 78-1767, discussed below. We have

*Honorable William C. Hanson, Senior United States District Judge for the Southern District of Iowa, sitting by designation.

reviewed the transcript of the hearing before the bankruptcy judge. He found that the bankruptcy adjudication was not fraudulently commenced. That finding is not clearly erroneous. We also agree with the bankruptcy court's conclusion that when plaintiffs filed a voluntary petition in 1967 they waived any defects in the bankruptcy court's jurisdiction attributable to the 1966 involuntary petition. Plaintiffs' argument that the bankruptcy judge forbade them to introduce evidence is not borne out by the record.

VIII. Sanctions

None of these appeals raises any substantial issues. They are, however, consistent with plaintiffs' decade-long career of frivolous litigation in the federal and California state courts which apparently has no object but to delay the final settlement of the bankruptcy estate. We therefore assess sanctions against plaintiffs and in favor of defendnats in the amount of defendants' reasonable attorney's fees, and twice the amount of the costs, incurred in these appeals. Fed. R. App. P. 38; 28 U.S.C. §1912 (1976).

APPENDIX (v)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: GEORGE C. HIGHLEY, Bankrupt, Highlanders, Inc., Bankrupt,	
HIGHLANDERS, INC., et al., Plaintiffs-Appellants, vs. DON ROTHMAN, Trustee Defendant-Appellee.	Nos. 78-2810, 78-2811, 78-2812, 79-3024, 79-3033, 79-3157, 78-1767
	ORDER
HIGHLANDERS, INC., and EMANUEL COMORA, Plaintiffs-Appellants, vs. DON ROTHMAN, et al., Defendants-Appellees.	

FILED
JUL 17 1980
RICHARD H. DEANE
Clerk, U.S. Court of Appeals

Before: WALLACE and SCHROEDER, Circuit Judges, and HANSON*, District Judge

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable William C. Hanson, Senior United States District Judge for the Southern District of Iowa, sitting by designation.

APPENDIX (vi)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: GEORGE C. HIGHLEY, Bankrupt,
Highlanders, Inc., Bankrupt,

HIGHLANDERS, INC., et al., Plaintiffs-Appellants,

vs.

DON ROTHMAN, Trustee, Defendant-Appellee.

HIGHLANDERS, INC., and EMANUEL COMORA, Plaintiffs-Appellants,

vs.

DON ROTHMAN, et al., Defendants-Appellees

FILED
JULY 21 1980
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

Nos.
78-2810, 78-2811
78-2812, 79-3024
79-3033, 79-3157
78-1767

ORDER

Before: WALLACE and SCHROEDER, Circuit Judges, and HANSON,* District Judge

Upon due consideration, the court awards appellee's double costs on appeal in the amount of five thousand eighty seven dollars and ninety two cents ($5,087.92) and reasonable attorney's fees in the amount of sixteen thousand seventy eight dollars and seventy five cents ($16,078.75).

*Honorable William C. Hanson, Senior United States District Judge for the Southern District of Iowa, sitting by designation.

APPENDIX (vii)

Supreme Court of the United States

No. A-327

HIGHLANDERS, INC., ET AL.,

Petitioners,

v.

DON ROTHMAN, TRUSTEE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 17, 1980.

/s/ William H. Rehnquist

Asociate Justice of the Supreme
Court of the United States

Dated this 16
day of October, 1980.

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 612 N. Bush, Santa Ana, California 92701.

On November 17, 1980, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in each of four sealed envelopes, with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

Don Roth, Trustee
Gendel, Raskoff, Shapiro
& Quittner
Suite 600
1801 Century Park East
Los Angeles, CA 90067

Danning & Gill
Attorney for the
Petitioning Creditors
15233 Ventura Blvd.
Sherman Oaks, CA 91403

Don Rothman, Trustee
615 South Flower St.
Los Angeles, CA 90017

Minor, Popeney & Lebetsamer
Attorney
Sanitek Products, Inc.
3878 West Carson Street
Torrance, CA 90503

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on November 17, 1980, at Santa Ana, California.

Jack Gallagher